# TERRORISM AND THE RULE OF LAW: A SHIFT FROM KARTAR SINGH TO THE TRIAL OF AJMAL KASAB

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**Abstract**

*In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, alert to see that any coercive action is justified in law.*

-Lord Atkin (1942)

The paper attempts to trace the change in the attitude of Indian judiciary in combating terrorism. Terrorism has been identified as the greatest menace facing the mankind in the 21st century. India has officially identified terrorism as one of the most critical challenges that faces it in the post Iraq war world. The driving force in the global politics since 2/11 is also nothing but terrorism. For some years, post 2/11 tackling of terrorism has become a prime agenda of governance and the political and governance sphere has been devising techniques to tackle terrorist menace. However, instead of legal methods, most countries have been resorting to extra legal methods, citing the reason "extra ordinary circumstances" call for extra ordinary measures to tackle them. These measures include Guantanamo Bay type detention, rendition and similar methods which are facing vehement criticism from human rights advocates. However in Indian Constitution the rule of law is the basic structure which cannot be done away with and therefore, respect for life and dignity of all at all times and equality before law is right of all. However, earlier starting with the *trial of Kartar Singh* the Supreme court of India erred in failing to respect the due process and the paper attempts to analyse various lacunas in the judgment and how during this time the court has changed its approach which is reflected in the *trial of Ajmal Kasab*, terrorist from Pakistan guilty of Mumbai bombing on 26th November, 2002, wherein the rule of law was given the paramount importance.

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## 1. Introduction

Defining Terrorism

Terrorism is a word that is often used, but which cannot have any internationally agreed definition. One reason for the lack of a commonly agreed definition is that terrorist sometimes tend to identify themselves with freedom fighters and no democratic nation can easily disown the various tactics that are used in their own freedom struggle. Political overtones in the terrorist movements and the high ideals and sublime causes the terrorist organization use as a façade to their activities create confusion amongst the sympathizers of the cause, creating deep political rift when a definition that can include these terrorist groups are attempted.[1] The difficulty in defining terrorism also lies in the fact that defining the term requires taking a political stand rather than a legal stand. For example, Osama Bin Laden and Taliban were called freedom fighters when they were fighting the Soviet occupation of Afghanistan and CIA supported them. Post 9/11, they are seen as terrorists. More closely, the United Nations views Palestinians as freedom fighters, struggling against the unlawful occupation of their land by Israel, and engaged in a long-established legitimate resistance, yet Israel regards them as terrorists.[2] Thus defining the term terrorism and laying down its characteristics is a highly subjective exercise, amounting to shifting the position of goal post in the midst of a football match.

Carsten Bockstette of George C. Marshall Center for European Security Studies has attempted to define terrorism as follows:[3]

> "Terrorism is defined as political violence in an asymmetrical conflict that is designed to induce terror and psychic fear (sometimes indiscriminate) through the violent victimization and destruction of noncombatant targets (sometimes iconic symbols). Such acts are meant to send a message from an illicit clandestine organization. The purpose of terrorism is to exploit the media in order to achieve maximum attainable publicity as an amplifying force multiplier in order to influence the targeted audience(s) in order to reach short- and midterm political goals and/or desired long-term end states."

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1 John Varghese, *Coping With International Terrorism-An Indian Experience*, (May 13, 2010), *available at* http://ssrn.com/abstract=1606022.

2 *Id.*

3 Bockstette & Carsten, *Jihadist Terrorist Use Of Strategic Communication Management Techniques*, George C. Marshall Center Occasional Paper Series, 20 (2008).

Some of the commonly agreed characteristics of a terrorist movement are:

- Violence
- Psychological impact and fear
- Perpetrated for a political goal
- Deliberate targeting of non-combatants
- Unlawfulness or legitimacy

The Hon'ble Supreme Court of India has tried to define terrorism in *Mohd. Khalid v. State of West Bengal*[4] and made following observation: "Terrorism is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilised society.

"Terrorism" has not been defined under TADA nor is it possible to give a precise definition of "terrorism" or lay down what constitutes "terrorism". It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process but the extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land and its main objective is to overawe the Government or disturb the harmony of the society or "terrorise" people and the society and not only those directly assaulted, with a view to disturb the even tempo, peace and tranquility of the society and create a sense of fear and insecurity."[5]

A simpler definition was attempted by the Hon'ble Supreme Court in *Hitendra Vishnu Thakur v. State of Maharashtra*[6] where in it was held:

> "A 'terrorist' activity does not merely arise by causing disturbance of law and order or of public order. The fall out of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. Experience has shown us that 'terrorism' is generally an attempt to acquire or maintain power or control by intimidation and causing fear and helplessness in

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4 7 S.C.C .334 (2000).
5 *Id.* at ¶ 46.
6 Cri. L.J. 517 (1995).

> the minds of the people at large or any section thereof and is a totally abnormal phenomenon."[7]

Defining the concept thus, the courts also tried to find a formula for application of the definition to various scenarios. The outlines of the test were laid down by the Apex Court in *Girdhari Parmanand Vadhava v. State of Maharashtra*[8] as follows:

> "It is the impact of the crime and its fallout on the society and the potentiality of such crime in producing fear in the minds of the people or a section of the people which makes a crime, a terrorist activity".

However in *Jaywant Dattatray Surya Rao v. State of Maharashtra*[9] the court has iterated the need for application of judicial mind before branding any activity as terrorist activity in the following words:

> "It is not possible to define 'terrorism' by precise words. Whether the act was committed with intent to strike terror in the people or a section of the people would depend upon facts of each case. Further, for finding out intention of the accused, there would hardly be a few cases where there could be direct evidence. Mainly it is to be inferred from the circumstances of each case. In appropriate cases, from the nature of violent act, inference can be called out."

Thus it may be stated that meaning of terrorism cannot be put in a straight jacket formula and to brand a crime as a terrorist activity the means as well as the end of the activity has to be taken into account and also the effect and intention of such acts.

## 2. Rule of law at a glance

Democracy, human rights, and the rule of law: three expressions that sit together like air, earth and water. They are elemental for all right-thinking people.[10] They are inter-dependant. As Lord Woolf, Lord Chief Justice of England and Wales has said: "Human rights come with democracy, whether the government wants them

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7 *Id* at p. 618 ¶ 7.
8 11 S.C.C .179 (1996).
9 10 S.C.C. 109 (2001).
10 Speech Delivered by Nicholas Cowdery, *Terrorism and the Rule of Law in International Association of Prosecutors*, 8th Annual Conference, Washington, Dc (August 10-14, 2003), *available at* http://www.odpp.nsw.gov.au/speeches/IAP%202003%20%20Terrorism%20and%20the%20Rule%20of%20Law.htm#_ftnref2.

or not".[11] Democracy and human rights cannot be enjoyed without the rule of law. The Preamble to the Universal Declaration of Human Rights (1948) states that: "It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

There are two principal features of the rule of law:[12]

- The people (including the government) should be ruled by the law and obey it.
- The law should be such that the people will be able and willing to be ruled (or guided) by it.

From those features twelve more particular requirements can be deduced which are to be met before it can be said that the rule of law is truly in operation:[13]

1. There must be laws prohibiting and protecting against private violence and coercion, general lawlessness and anarchy.
2. The government must be bound (as far as possible) by the same laws that bind the individual.
3. The law must possess characteristics of certainty, generality and equality. Certainty requires that the law be prospective, open, clear and relatively stable. Laws must be of general application to all subjects. They must apply equally to all.
4. The law must be and remain reasonably in accordance with informed public opinion and general social values and there must be some mechanism (formal or informal) for ensuring that.
5. There must be institutions and procedures that are capable of speedily enforcing the law.
6. There must be effective procedures and institutions to ensure that government action is also in accordance with the law.
7. There must be an independent judiciary, so that it may be relied upon to apply the law.
8. A system of legal representation is required, preferably by an organised and independent legal profession.
9. The principles of "natural justice" (or procedural fairness) must be observed in all hearings.

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**11** *Id.*
**12** *Id.*
**13** *Id.*

10. The courts must be accessible, without long delays and high costs.
11. Enforcement of the law must be impartial and honest.
12. There must be an enlightened public opinion – a public spirit or attitude favouring the application of these propositions.

Professor Geoffrey de Q Walker wrote in his book *The Rule of Law* (Melbourne University Press, 1988) that the rule of law: "is plainly the essential prerequisite of our whole legal, constitutional and perhaps social order. The rule of law is not a complete formula for the good society, but there can be no good society without it."

However, British Jurist A. V. Dicey popularized the phrase "rule of law" in 1885. Dicey emphasized three aspects of the rule of law:

1. No one can be punished or made to suffer except for a breach of law proved in an ordinary court.
2. No one is above the law and everyone is equal before the law regardless of social, economic, or political status.
3. The rule of law includes the results of judicial decisions determining the rights of private persons.

In India the meaning of rule of law is much expanded and it is regarded as the part of the basic structure of the constitution and therefore, it cannot be abrogated or destroyed even by the Parliament[14]. The concept "rule of law" is used in contradistinction to the 'rule of man' i.e. it is the law that rules and arbitrary action is complete antithesis of the rule of law. The rule of law envisages that the discretion conferred upon executive authority must be contained within clearly defined limits.[15] It was stated by Justice Bhagwati in the case of *Bacchan Singh v. State of Punjab*[16] that the rule of law permeates the entire fabrics of the Constitution of India and it forms one of its basic features which cannot be done away with. The Constitution of India not only establishes the rule of law but also provides for its protection and enforcement through Arts.14, 19, 20, 21, and Art.144 the judicial review power given to judiciary.

### 3. Combating terrorism under the rule of law: A conflict?

As is been stated earlier that the judiciary is given power of judicial review to uphold rule of law in the country, which is the

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14 KAILASH RAI, THE CONSTITUTIONAL LAW OF INDIA 59 (Allahabad: Central Law Publication 7th Ed. 2008).

15 *Id.*

16 A.I.R. S.C. 1325 (1982).

basic feature of the Indian constitution and a part of its basic structure and the issue of combating terrorism under the rule of law is for the judiciary and human rights institutions a matter of serious concern. The Supreme Court in *Indira Gandhi v. Raj Narain*[17] observed that: "the major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license."

The core values of our constitutional philosophy indicated in the Preamble to the constitution are: dignity of the individual and unity and integrity of the nation, which clearly reflects that the two can obviously co-exist otherwise makers of the constitution would not have included them together in the Preamble as a core value and therefore an attempt should be made to balance the two in all state actions including legislation, its interpretation and implementation.[18] Thus it may be stated that the methods to counter terrorism must not disregard constitutional provisions.

Terrorism regardless of motivation has to be countered and condemned but this has to be done taking all necessary measures in accordance with the relevant provisions of the International Law and international standards of human rights and we must fight this just war using means that are righteous, that are in conformity with our constitution, our law and our treaty obligations.[19]

The General Assembly of the United Nations considered the item entitled *Measures to Eliminate International Terrorism* in its resolution 22/158 of December 12, 2000 and stated: "all actions, methods and tactics of terrorism are criminal and unjust and are in any circumstances unjustifiable and calls for all states to adopt measures in accordance with the Charter of the UN and the relevant provisions of the international law, including international standards of human rights."[20]

A similar view has been expressed in successive resolutions of General Assembly and UN Commission of Human Rights on the items titled *Human rights and Terrorism*.

The Attorney General for India, Mr. Soli Sorabjee, quotes Mary Robinson, the UN Commissioner for Human Rights from the

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17 A.I.R. S.C. 2299 (1975).

18 J.S. Verma, *Combating Terrorism under the Rule of Law*, 28(1) COCHIN UNIVERSITY LAW REVIEW 1, 3 (2004).

19 *Id.* at 4, 5.

20 *Id.* at 7.

Annual Report in the following words,[21] "there should be three guiding principles for the world community:

1. the need to eliminate discrimination and build a just and tolerant world;
2. the co-operation by all States against terrorism, without using such co-operation as a pretext to infringe on human rights;
3. A strengthened commitment to the Rule of Law."

He further quotes that: "human rights are no hindrance to the promotion of peace and security, and rather they are an essential element of any strategy to defeat terrorism."

Thus although apparently there seems to be a conflict between rule of law and terrorism measures but in reality there is no such conflict and both can go hand in hand and both must go hand in hand. Terrorism poses one of the gravest challenges to the rule of law because Terrorists hold the law in utter contempt and show no regard for even the basic right of innocent citizens to life and thus are the worst violators of the rule of law, therefore, in dealing with terrorists and their horrendous criminal acts, a firm and no-nonsense approach, albeit within the bounds of law, is no doubt an imperative of the rule of law itself but terrorists often adopt strategies and tactics that force the police and other security forces to overreact, 'violation of human rights' then becomes an issue, not just at the national but often even at the international level wherein terrorists seek to use this as a weapon to delegitimize the state's claim to democracy and rule of law while legitimizing their own violent activities and the vicious cycle goes on.[22] It is, therefore, imperative that the highest priority be attached to adherence to the rule of law, in all its facets, by the law enforcement agencies even while dealing firmly with terrorists.

## 4. Terrorism and Indian law

Traditionally Indian laws had been reluctant to directly address the problem of terrorism. Perhaps one of the reasons for the reluctance was that the struggle for independence might have taught the leaders of independent India that it is easy for the administration to brandish any person a terrorist. However they were very much sensitive to the threat of terrorism and have tried to curb the same by giving arbitrary power to the uniformed

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21 *Sunday Times of India (India)*, Nov. 11, 2001. See also *Id.* at 7-9.

22 Kamal Kumar, *Terrorism, Rule of Law and Police Reforms*, 38(1) ASCI JOURNAL OF MANAGEMENT, 21, 21-22 (2009).

forces. The main pillars in India's legal fight against terrorism were:

- Preventive detention
- Special provisions in statues like Indian Penal Code
- Special statutes like TADA, POTA, Armed Forces (Special Power's) Act etc.

## 4.1 Emergency and security laws from 1947 to 1975

From 1947 to 1975, independent India followed the same basic pattern established by the British in its use of emergency and security laws. While India's post-independence constitution includes an extensive array of fundamental rights protections, its emergency and security provisions incorporate a number of the same basic principles found in the Government of India Act of 1935: extraordinary powers that may be exercised during declared periods of emergency, but supplemented by several layers of preventive detention and other security laws that readily afford the government multiple options to exercise similar powers even outside of formally declared periods of emergency.

i. Formal emergency powers

The Constitution under Article 352 authorizes the President to declare a national emergency in circumstances involving a grave threat to the security of India or any part of its territory on account of (1) war, (2) external aggression, or (3) internal disturbance or imminent danger of internal disturbance. Upon proclaiming an emergency, the central government could exercise a broad range of special powers. Perhaps most significantly, fundamental rights under article 19 of the Constitution would automatically be suspended by the declaration of emergency, and the executive was conferred with the power to suspend judicial enforcement of any other fundamental rights.

ii. Non-emergency preventive detention laws

The Indian Constitution explicitly authorizes preventive detention during ordinary, non-emergency periods. Subject to limited procedural safeguards, the Constitution explicitly grants both the central and state governments power to enact laws authorizing preventive detention. Preventive detention ordinarily may not extend beyond three months without approval of an "Advisory Board," an administrative tribunal consisting of current or former High Court judges or individuals "qualified to be appointed" as High Court judges. The detainee must be told the basis for detention "as soon as can be" and have an opportunity to

challenge the detention order.[23] However, these procedural protections are qualified. Parliament may specify circumstances justifying extended detention without Advisory Board review, and the detaining authority may withhold any information if it deems disclosure against the "public interest."[24] Preventive detention laws also are explicitly excused from complying with other constitutional protections, such as the right to counsel, to be produced before a magistrate within 24 hours of being taken into custody, or to be informed promptly of the grounds for arrest.[25]

Within weeks after the Constitution went into force, Parliament enacted The Preventive Detention Act of 1950, which authorized detention for up to 12 months by both the central and state governments if necessary to prevent an individual from acting in a manner prejudicial to the defense or security of India, India's relations with foreign powers, state security or maintenance of public order, or maintenance of essential supplies and services. The act also implemented the limited procedural protections required by the Constitution. The PDA was originally set to expire after one year. Indeed, the Home Minister explicitly stated that the bill was meant as a temporary expedient, intended only to address exigent circumstances in the aftermath of independence and partition, and that any decision to make it permanent demanded closer study.[26] However, as with the use of formal emergency authority, this "temporary expedient" was routinely reenacted each year for almost 20 years.[27] While it finally lapsed in 1969, preventive detention authority returned less than two years later under The Maintenance of Internal Security Act (MISA), which largely restored the provisions of the PDA.

During emergency MISA and other preventive detention laws were amended during the Emergency to permit much longer periods of detention, to make it easier for the government to exercise detention authority without Advisory Board scrutiny, and to eliminate other procedural protections that otherwise applied, ultimately, over 111,000 people were detained under MISA and other laws during the Emergency.[28]

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23 INDIA CONST. art.1, cl. 4-6.
24 *Id.* art. 22(7).
25 *Id.* art. 22(3).
26 Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India,* 20(1) COLUMBIA JOURNAL OF ASIAN LAW 93, 135 (2006).
27 *Id.*
28 *Id.* at 138.

iii. Non-Emergency Criminal Laws

The Constitution explicitly authorizes Parliament to impose "reasonable restrictions" on freedom of speech, expression, peaceable assembly, and association in the "interests of the sovereignty and integrity of India." Pursuant to this authority, Parliament enacted the Unlawful Activities (Prevention) Act of 1967, which remains in effect today and affords the central government broad power to ban as "unlawful" any association involved with any action, "whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise," that is intended to express or support any claim to secession or that "disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India." Once an organization has been banned as "unlawful," UAPA provides the central government with broad powers to restrict its activities.

iv. Post-Emergency Legislations

In the wake of the Emergency, the Janata-led government amended the Constitution to rein in the government's authority to exercise extraordinary powers, repealing some of the constitutional changes made during the Emergency and adding additional safeguards. The Congress government issued a sweeping preventive detention ordinance to replace MISA in 1979, which ultimately was replaced by an Act of Parliament, The National Security Act of 1980. The NSA, which remains in effect today, restored many of the provisions found in the PDA and the pre-Emergency version of MISA and "presaged years of new repressive legislation," including TADA and POTA.

### 4.2 The Terrorist and Disruptive Activities (Prevention) Act, 1985

Criminal laws explicitly designed to combat "terrorism" were enacted during the 1980s in response to an extended period of violence in Punjab. TADA was enacted in the wake of Indira Gandhi's assassination.[29] TADA explicitly defined a series of new, substantive terrorism-related offenses of general applicability, which could be prosecuted by state governments throughout the country without any central government designation that the area in which the offense took place was "terrorist affected." At one level, this may have been desirable but at the same time, enactment of a powerful, nationwide antiterrorism law without

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[29] *Id.* at 145.

sufficient safeguards to constrain its misuse and ensure national uniformity in its application led to human rights abuses and disparate patterns of enforcement throughout the country.[30] The procedural rules under TADA departed from the ordinary rules of evidence and criminal procedure in several respects. While ordinary law precludes admissibility of any confessions made to police officers, TADA provided instead that confessions to police officers could be admitted as substantive evidence as long as the officer's rank was superintendent or higher; the confession was recorded in writing, audio, or video; and the confession was voluntary. The stringent bail and pretrial detention provisions and the special procedural rules for the special courts under the predecessor TAAA also were included under TADA.

Human rights advocates sharply criticized the antiterrorism practices of the central and state governments in Punjab and elsewhere throughout the late 1980s and early 1990s, however, the Supreme Court of India ultimately upheld the constitutionality of TADA in almost all respects, although it did seek to rein in its potential misuse by requiring relatively modest safeguards.[31] However, political opposition to the law and the manner in which it was applied continued, and by the early 1990s, the overall level of violence had declined sharply in Punjab, the state which originally had been the impetus for TADA's enactment. TADA contained a sunset provision requiring Parliament to reconsider and renew the legislation every two years, and by the mid-1990s political pressure had mounted on Parliament not to renew the Act when it expired. In February 1995, the chairperson of the NHRC wrote a letter to all members of Parliament urging them not to renew TADA.[32] Even the Supreme Court of India, in upholding TADA's constitutionality, noted with concerns the "sheer misuse and abuse of the Act by the police." When TADA came up for renewal, the Congress-led government ultimately lacked support to renew the law and it was permitted to lapse in May 1995.[33]

### 4.3 The Prevention of Terrorism Act of 2002 and the aftermath of its repeal

The Law Commission presented a report in 1999 by proposing a new Prevention of Terrorism Bill based largely on the Criminal Law Amendment Bill of 1995. Throughout 2000 and 2001, the then government sought to enact a new antiterrorism law based

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30 *Id.*
31 *Id.* at 149.
32 *Id.*
33 *Id.* at 150.

on this proposal, these efforts were met with vigorous resistance from all corners.[34] However, the terrorist attacks on September 11, 2001, affected the political dynamics in India and within weeks, the government ushered its preexisting proposal into law as an ordinance, The Prevention of Terrorism Ordinance. Soon after POTO was promulgated, the Home Minister asserted that POTO's opponents "would be wittingly or unwittingly pleasing the terrorists by blocking it in Parliament" and despite vigorous opposition, Parliament ultimately affirmed the government's ordinance, enacting The Prevention of Terrorism Act into law in March 2002, during an extraordinary joint session of both houses of Parliament.[35] POTA quickly became highly controversial for many of the same reasons that made TADA controversial years earlier. It was repealed in 2004 however; the cases pending under the Act were to continue.

### 4.4 Present Scenario[36]

i. The National Investigation Agency (NIA) Act, 2008

The officers of the NIA will have all the powers, privileges and liabilities which the police officers have in connection with the investigation of any offence. The superintendence of the NIA shall vest in the Government of India and the administration will vest in the officer designated on this behalf by it. The police officer in charge of the police station on receipt of the report of the offence shall forward it to the state government which in turn will forward the same to the Central Government. If the Central Government is of the opinion that the offence is a Scheduled Offence, it shall direct the agency for investigation of such offence. The NIA may also investigate other offences connected with the Scheduled Offence.

The Government of India shall constitute Special Courts for the trial of Scheduled Offences. The Special Courts shall try the offences committed within its local Jurisdiction. For the purpose of having a fair or speedy trial or in the interest of justice, the Supreme Court of India may transfer any case pending with the Special Court to another Special Court in the same state or any other state and the High Court may transfer such cases to any other Special Court within the state. Clause 16 of the NIA Bill

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34 *Id.*

35 *Id.* at 152.

36 Bhupendra Acharya, *Anti-terrorism Laws in India: Distinguishing Myth & Reality* (Oct. 11, 2010), *available at* http://legalservicesindia.com/article/article/anti&-8208-terrorism-laws-in-india-382-1.html.

seeks to provide for procedure to be adopted and powers to be exercised by the Special Court for trial of the Scheduled Offences. It seeks to provide that offences punishable with imprisonment for a term not exceeding three years or with fine or with both, may be tried summarily. The Special Court will have all the powers of the Court of Sessions under the Code of Criminal Procedure, 1973 for the purpose of trial of any offence under this Act.

NIA is a police force created and administered by the Government of India which endows all personnel above the rank of sub-Inspector of police with powers throughout the Indian Territory. The Act empowers the police stations of the state to register first information as to the commission of the offence and then forwarded it to Central Government. The State Government shall then forward this information to the Centre which would on basis of inputs decide within 15 days by invoking the power of NIA. Once the NIA enters the investigation, the authority of state government agencies would stand extinguished and all the relevant materials and records shall be transferred to NIA. The National Investigation Agency (NIA) investigates the acts of terrorism and offences related to atomic energy, aviation, maritime transport sedition, weapons of mass destruction and left wing extremism but excluded the Hindu right wing extremism which is more destructive than the naxal or left wing extremism.

The establishment of NIA is no doubt a positive step in fighting terrorism-related crimes, but it is unlikely to be a panacea to prevent terrorist attacks. For, it will be an agency that investigates and prosecutes only after terrorist attacks take place.

One criticism against the Act is that it has so many features giving power to the Centre, and that it undermines the federal character of our country and the supremacy given to the Centre as per the Act will encroach upon the powers of the State Governments. A counter argument against this can be that terrorism is a menace that affects the whole country and not a single state and therefore the Centre should be given more powers in the execution of such an anti-terrorism legislation.

ii. The Unlawful Activities (Prevention) Amendment Act, 2008

The Unlawful Activities (Prevention) Act, 1967 was conceived to put reasonable restrictions, on the freedom of speech and expression, the right to assemble peacefully or unions for the interests of the India's sovereignty and integrity. The Indian Parliament amended the Act in 2004 following the repeal of Prevention of Terrorism Act, 2002 (POTA).This changed the entire

character of the Act and made it more of an anti terrorism legislation. The Unlawful Activities (Prevention) Amendment Act, 2008 made a number of procedural and substantive changes to empower the NIA, Act effectively and decisively on terrorism.

These are some of the important changes that have been brought about in the amendment act. Section 17 was replaced by a provision which makes such persons punishable who collects or provides funds or attempts to do the same and has knowledge that such funds are likely to be used for terrorist activities. Two additional provisions have been inserted after section 18 of the Unlawful Activities Prevention Act, 1967. Section 18A deals with the offence of organizing or causing the organization of any camp or camps for imparting training in terrorism and section 18B deals with the offence of recruiting or causing the recruitment of any person for the purpose of committing a terrorist act. A new Section 43D has been incorporated in the Amendment Act, which has increased the maximum period of custodial interrogation (remand) to 180 days, a increase of over the 90 days allowed under Section 167 of the Code of Criminal Procedure of 1973. Section 43E introduces the principles of presumption of guilt, which was also present in POTA. According to the section arms, explosives or other substances specified in Section 15 of the Act, if recovered from the possession of the accused and if there is reason to believe that substances of similar nature will be used in the commission of the offence, the court shall presume that accused has committed such offence. Critics have countered this section 43E stating that our criminal justice system is based on the presumption of innocence until proved guilty. The onus of proving the guilt of the accused is invariably and always on the prosecution whereas as per Section 43E if a person is found with the weapon the onus would be upon him to prove that he is not guilty. This provision hits at the root perception of Indian criminal jurisprudence which is inquisitorial.

This legislation again meets the objectives of speedy and efficient investigation, fair and speedy trial, and deterrent punishment. However similar to the NIA act, it comes into play only after the terrorist act has been committed and may not prove to be a deterring legislation and is merely curative in character.

## 5. Judicial response to terrorism in India

### 5.1 Phase I: Stricter law to counter terrorism

Since our country is in a firm grip of Terrorism it becomes very necessary in a country like India that if a law regarding terrorism

is enacted it should be made so stringent that the culprit be bought to book and does not go scot-free just because of the loopholes and lacunas in the ordinary law. When TADA was enacted it came to be challenged before the Apex Court of the country as being unconstitutional. During the first phase of its judicial decision making the Supreme Court of India upheld the constitutional validity of such stricter laws on the assumption that those entrusted with such draconic statutory powers would act in good faith and for the public good. The case of *Kartar Singh v. State of Punjab*[37] is important in this respect.

In giving its decision, the Court emphasized that the legislation must be seen in light of the context in which it is made. It was noted that terrorism is a worldwide phenomenon and India is not an exception. In the words of the Court: "in recent times the country has fallen in the firm grip of spiraling terrorists' violence and is caught between the deadly pangs of disruptive activities. In such a situations measure must be taken to solve the issue."

The petitioners in the present case challenged the constitutional validity of TADA on the grounds that;

a) The Legislature was not competent to make them and
b) They violate the rights mentioned in part III of the Indian Constitution.

In this case for the first time 'defense of India' under Entry 1 of List I of Schedule VII was also understood in terms of the internal sovereignty of the State. Terrorism in effect, is a threat to the internal sovereignty of the State and is at a level today where normal law and order agencies cannot seem to handle it. It then becomes necessary to have a Central legislation to deal with this menace. This interpretation to understand the judgment then also gives a new understanding to entry 1 of List I to include acts that threaten the Country both, internally and externally and makes the legislature competent to enact special stricter laws to combat terrorism.

Thus in this phase of decision making the Supreme court upheld the validity of stricter law to counter terrorism, however, in certain respect this decision of the court does not seems correct as it fails to take into account the violation of fundamental rights by such laws and thereby undermining the rule of law.

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37 3 S.C.C. 569 (1994).

Criticism of the decision

One of the main contentions in this case was that the provisions are against the principles of natural justice as enshrined in Article 21 of the Constitution. These included, the right to a fair and speedy trial, presumption of innocence, the right to a fair hearing and acts according to the 'procedure established by law'.

- The Court answered this in light of the distinction between a special law and a general law. Stating that the impugned Acts are special in the sense that they are made to deal with only particular instances, the Court said that deviances from the procedure in ordinary laws is permissible. Then for instance, the Court can remove the burden of proof and presume the person guilty until innocent, however the procedure should not be arbitrary as was held in the case of *Maneka Gandhi v. UOI*, whereas in the impugned Acts, discretion is given to the authorities to apply the kind of law that may please. The procedure established by law must not in any way be arbitrary and affect the life and personal liberty of the individual.
- Another point that has been emphasized in this case is that if a law ensures and protects the greater social interest, then such a law will be regarded as a wholesome and beneficial law although it may infringe the liberty of some individuals. However, Article 21 clearly states "No one shall be deprived.....established by law" such a right is clearly an individual right the responsibility for the protection of which is in the hands of the State, and individuals rights are not permitted to be compromised in light of a majority or in the name of security of the State as was stated by Justice Krishna Iyer that "procedure established by law" is synonymous to "due process" under US law wherein in the case of *Hamdi v. Rumsfeld* the Court held that strict procedures and measures like unlawful detention to tackle terrorism violate due process and state security cannot be used as an excuse.[38]
- Another criticism is with regard to the confession before police officer is held to be valid, but it may be noted that the provision for protection of an accused against self-incrimination is one of the dearest principles of criminal justice. Guarantees are given for it in Article 20 (3) of the Indian Constitution. Sections 25 and 26 of the Indian Evidence Act and 161, 164 of the Code of Criminal

38 542 U.S. 507 (2004).

Procedure seek to secure this provision. Section 25 makes any confession before a police officer inadmissible in evidence. Section 26 enjoins that no confession made by any person whilst in police custody even to a person other than a police officer is admissible, unless made in the immediate presence of a Magistrate. The reason that a police officer in not allowed to record a confession is because of the possibility of abuse and torture that the accused might suffer. It for this reason then that the Magistrate has to confirm from the accused that his confession is voluntarily given and he has not suffered any harm. In *Olga Tellis v. Bombay Municipal Corporation*, the Court observed, "If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down".

It must further be observed that the impugned acts have not placed any checks and balances to ensure that the confessions made are voluntary. Section 15 of the TADA then clearly abrogates this constitutional right and has not placed any checks to prevent its abuse. No law then can provide for any arbitrary procedure that violates the guarantees given by the Constitution. The admissibility of custodial confessions violates the very aspect of due process and fairness guaranteed in Article 21 of the Indian Constitution.

The judgment given by the Court in *Kartar Singh* then is erroneous. In the name of the security of the State, legislation cannot compromise the rights of the individuals. All along the case, the Court has stressed that the situation in the country demands the need for strict measures and even if they violate the rights in part III, they are justified. We must not forget that we are a democracy, in fact, the world's largest democracy. When a government is made for the people and by the people, it must protect the rights of everyone and not just a majority. Terrorisms greatest victory would be the shackling of the very foundations that we have stood for the past many years.

Similarly, in the case of *People's Union for Civil Liberties v. Union of India*,[39] the constitutional validity of the Prevention of Terrorism

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**39** 9 S.C.C. 580 (2004).

Act, 2002 was discussed. The court said that the Parliament possesses power under Article 248 and entry 97 of list I of the Seventh Schedule of the Constitution of India to legislate the Act. Need for the Act is a matter of policy and the court cannot go into the same. Once legislation is passed, the Govt. has an obligation to exercise all available options to prevent terrorism within the bounds of the constitution. Mere possibility of abuse cannot be a ground for denying the vesting of powers or for declaring a statute unconstitutionally. Court upheld the constitutional validity of the various provisions of the Act.

Thus during this phase Apex court was of the view that special law is necessary to combat terrorism.

### 5.2 Phase II: Special law to be applied with safeguards

Owing to widespread protest against TADA, and the Report of NHRC the law was repealed, however, on the basis of the recommendations given in the 173rd Report of the Law Commission in 2000, another law was made on the lines of TADA. Although the Court in the case of *Kartar Singh* upheld the constitutional validity of the law but introduced certain changes in the way the law would be worked so as to ensure that the vice of arbitrary use of powers did not creep in and issued various directions[40] in this regard and the power of review was granted. The court clarified that the review ordered in *Kartar Singh* was intended "to ensure that there was no misuse of the stringent provisions of TADA and any case in which resort to TADA was found to be unwarranted, the necessary remedial measures should be taken" and that the Designated Court was expected to give "due weight to the opinion formed by the Public Prosecutor on

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40 In Kartar Singh v. State of Punjab, [3 SCC 569 (1994): AIR 1995 SCC 1726], with a view to prevent any possible misuse of the stringent provisions of TADA, 1987, the Constitution Bench suggested a strict review of the cases, through the observations made thus: "In order to ensure higher level of scrutiny and applicability of TADA Act, there must be a screening Committee or a Review Committee constituted by the Central Government consisting of the Home Secretary, Law Secretary and other Secretaries concerned of the various Departments to review all the TADA cases instituted by the Central Government as well as to have a quarterly administrative review, reviewing the States' action in the application of the TADA provisions in the respective States, and the incidental questions arising in relation thereto. Similarly, there must be a Screening or Review Committee at the State level constituted by the respective States consisting of the Chief Secretary, Home Secretary, Law Secretary, Director General of Police (Law and Order) and other officials as the respective Government may think it fit, to review the action of the enforcing authorities under the Act and screen the cases registered under the provisions of the Act and decide the further course of action in every matter and so on."

the basis of the recommendation of the High Power Committee", if it was "based on the material present" indicating that "resort to provisions of TADA is unwarranted".[41] The Supreme Court took this similar view in several cases relating to application of TADA.[42]

With such events coming to a head in the form of attack on Indian Parliament on 13th December 2001, the legislature felt that the "existing criminal justice system" was not designed to deal with such types of heinous crimes. The Prevention of Terrorism Act, 2002, (commonly called as 'POTA') was enacted to make provisions "for the prevention of" and "for dealing with" terrorist activities, in the face of multifarious challenges in the management of internal security of the country.[43] Learning from past experience in the enforcement of special anti-terrorism legislation adopted earlier in the country, and conscious of the fact that the extra-ordinary nature of the powers and procedure provided by this new special law were prone to abuse for ulterior purposes by law enforcing agencies and pressure groups, the Legislature declared its intent to prevent such misuse by referring to the fact that "sufficient safeguards" were being engrafted in the law.[44] It is significant to note that the safeguards in such regard, which had been introduced by the Supreme Court through the judgment in *Kartar Singh*, now found adoption by the legislature as statutory requirements.

The constitutionality of POTA was also challenged before the Supreme Court of India, but found without merit. The judgment on the point is known as *People's Union for Civil Liberties v. UOI*[45]. The challenge was on the ground the basic human rights were being violated. The view of the Court in this regard is now well known, namely, that the "protection and promotion of human rights under the rule of law is essential in the prevention of terrorism", involving "court's responsibility" and that if human rights are violated in the process, it will be "self-defeating". It would also voice concern that "lack of hope for justice provides breeding grounds for terrorism" and, therefore, in the fight against terrorism "human rights" will have to be respected.

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41 J.Y.K. Sabharwal, the then CJI, *Meeting The Challenge of Terrorism-Indian Model (Experiments In India), available at* http://supremecourtofindia.nic.in/speeches/speeches_2006/terrorism%20paper.pdf (last visited on August 16, 2016).

42 Including Sanjay Dutt v. State of Maharashtra, 6 SCC 189 (1995).

43 *Supra* note 41.

44 *Id.*

45 9 S.C.C. 580 (2004).

The Court upheld the constitutional validity of POTA in People's Union for Civil Liberties, but again proceeded to temper the law so as to obviate the vice of arbitrary use by giving certain directions. It insisted on the element of mens rea for the offence of 'abetment' and on the element of "knowledge of the terrorist act" for the offence of "possession of unauthorized arms". It further added the ingredient of "intent" in the offences relating to membership of, support to, or raising of funds for a terrorists organization. Thereby, marking the phase of judicial decision making wherein, safeguards were adopted while applying strict laws to counter terrorism.

### 5.3 Phase III: Rule of law is upheld and protected

In this last phase a shift was made from the previous view and rule of law is considered to be supreme and to follow a path wherein "rule of Law" continues to be the fundamental benchmark and the basic rights are ensured even to those who are suspected of involvement in terrorist crimes. This view was first reiterated in the case of *D.K. Basu v. State of West Bengal*[46], wherein it was held that a suspect cannot be tortured even if there is a prospect of the crime going unpunished.

The State action making inroad into the personal liberties or basic human rights of an individual must always be scrutinized by the judiciary on the basis of objective proof, relevant material in accordance with law and through a procedure which passes the muster of fairness and impartiality.

Recently in the case of Ashraf Khan *@ Babu Munnekhan Pathan v. State of Gujarat* and *State of Gujarat v. Yusuf Khan @ Laplap Khudadattkhan Pathan and Ors.*[47] taken together[48] by a bench of Justices H.L. Dattu and C.K. Prasad said in 2002, ordered the acquittal of 11 persons, arrested under the Terrorist and Disruptive Activities (Prevention) Act and other laws, and convicted for allegedly planning to create communal violence during the Jagannath Puri Yatra in Ahmedabad in 1994 and *Ratio Decidendi* was established in the following words, "Conviction of Accused is vitiated on account of non-compliance of mandatory requirement of Law."

The court stated that, "We emphasise and deem it necessary to repeat that the gravity of the evil to the community from terrorism

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46 9 SCALE (1996).
47 JT 9 SC 661 (2012), 9 SCALE 413 (2012).
48 THE HINDU (India), September 27, 2012, *Emphasis supplied.*

can never furnish an adequate reason for invading personal liberty, except in accordance with the procedure established by the Constitution and the law," it further stated, "being an anti-terrorist law, the TADA's provisions could not be liberally construed", the Bench said. "The District Superintendent of Police and the Inspector-General and all others entrusted with operating the law must not do anything which allows its misuse and abuse and [must] ensure that no innocent person has the feeling of sufferance only because 'My name is Khan, but I am not a terrorist'."

Writing the judgment, Justice Prasad said: "We appreciate the anxiety of the police officers entrusted with preventing terrorism and the difficulty faced by them. Terrorism is a crime far serious in nature, graver in impact and highly dangerous in consequence. It can put the nation in shock, create fear and panic and disrupt communal peace and harmony. This task becomes more difficult when it is done by organized groups with outside support." But in the country of the Mahatma, the "means are more important than the end.

Now apart from Indian Penal Code there is no special law governing terrorism related activities, though several special powers are conferred on Armed Forces of the Country under Armed Forces (Special Powers) Act to deal with terrorism related activities.

The Indian response to terrorism has also been updated post 26/11 as is evident from the following excerpt from the speech of Her Excellency President of India[49]:

> "Terrorism is a perverse global phenomenon and the struggle against it must be carried to the world stage. In the modern world, distance and time do not provide insulation from the reach of terrorism. Terrorism easily transcends borders and thus becomes a transnational crime. Being a crime against humanity, it ought to be recognized as a common enemy of all nations. A terror threat against one, is a threat against all. The global counter-terrorism efforts may be an arduous and lengthy campaign, but must persistently target the entire global network. Countries must individually own up responsibilities, as must the international community, in

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**49** Speech By Her Excellency The President of India, Shrimati Pratibha Devisingh Patil, at the inauguration of the International Conference of Jurists on International Terrorism and Rule of Law, 2009, New Delhi, (November 21, 2009,) *available at* http://presidentofindia.nic.in/sp211109.html.

> collectively defeating terrorism and not deflect responsibility on to non-state actors. The responsibility to deal with them lies with the State from which they operate as it is the sanctuary, support and finances that they receive, which sustains their heinous and perverse acts."

The recent trial of the Pakistani terrorist Ajmal Amir Kasab[50], has also brought in much attention to the Indian judicial response in tackling terrorist menace. In this case a complete shift can be observed and no special or stricter law was applied in the present case and was convicted under the various provisions of the Indian Penal code. At various places in the judgment the hon'ble court upheld the rule of law. The court stated:

> "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent; that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

The Court pointed out that very firm protections against self-incrimination were available to the accused, to avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a magistrate, suggesting: "it would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession".

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**50** MANU/SC/0681/2012, 3 Crimes 209 SC (2012), JT 8 SC 4 (2012), 4 MLJ (Crl)15 (2012).

The court further quoted that, "To deal with one terrorist, we cannot take away the right given to the indigent and under-privileged people of this country by this Court thirty one (31) years ago."[51]

Finally at the conclusion of the case the court while commenting on the courts below made following observation, "In the course of hearing of the appeal we also came to know the trial Judge Shri Tahiliani. From the records of the case he appears to be a stern, no-nonsense person. But he is a true flag bearer of the rule of law in this country. The manner in which he conducted the trial proceedings and maintained the record is exemplary. We seriously recommend that the trial court records of this case be included in the curriculum of the National Judicial Authority and the Judicial Authorities of the different States as a model for criminal trial proceedings."

It is evident from this case that the judicial system of the country on the whole have been sensitive to the fact that a strict technical approach or a relaxed human rights approach will not do good for the national integrity and what is needed was a case to case approach which on the one hand need to take care of the human rights of the individual and on the other, work on a realistic platform realizing the threat faced by the country from terrorist activities. On the whole it can be summed up that Indian judiciary was an active partner in the country's war against terrorism and has at all occasions risen above political and academic concerns to address the real issue of terrorism.

## 6. Conclusion

The paper highlights the silent and gradual shift of the attitude of Indian judiciary in dealing with Terrorism, from the application of strict, unreasonable law to the observance of absolute due process, from enactment of TADA to POTA to placing faith in general law of the land thereby upholding equality for all. Sooner

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[51] Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, MANU/SC/0121/1979: 1 SCC 98 (1980): "The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State.... We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State"

or later it is realized that if terrorism must be stopped, proper measures that do not violate due process must be used. This was also emphasized in the UN Resolutions with regard to terrorism, where it was stated that in the prevention of terrorism the fundamental human rights of the individual must not be compromised. If democracy needs to survive, rights of the individual must never be compromised. I would like to stress upon once again that terrorism's greatest victory is shackling the very foundations of our democracy that is built upon rights and principles of natural justice. Our compromise is their victory.

We saw the invocation of the Terrorists and Disruptive Activities (Prevention) Acts (TADA), Prevention of terrorism Act (POTA) and more recently the Unlawful Activities Prevention Act (Amendment), 1967. All these legislations have violated due process mechanisms and prescribed strict procedure and penalties to tackle the menace of terrorism. This problem of compromising due process to combat terrorism however is not India specific. The detention of people in the United Kingdom, the terrorist laws in Spain and of course the measures of the United States are examples where developed legal systems are compromising civil liberties and rights in interests of national security. There is an unequivocal settlement that national interests are of primary importance. But what about rights and fundamental freedoms? Alan Dershowitz once emphasized that the Government loses credibility when it cannot tackle issues along due process concerns and resort to other means of prosecuting people.

It is highlighted in the project that there is no conflict between the protection of rights by upholding rule of law and measures to combat terrorism. Terrorism regardless of motivation has to be countered and condemned but this has to be done taking all necessary measures in accordance with the relevant provisions of the International Law and international standards of human rights and we must fight this just war using means that are righteous, that are in conformity with our constitution, our law and our treaty obligations. It is, therefore, imperative that the highest priority be attached to adherence to the rule of law, in all its facets, by the law enforcement agencies even while dealing firmly with terrorists. In the words of Justice K.G. Balakrishnan, "adherence to constitutional provisions of substantive due process must be an essential part of our collective response to terrorism. Any dilution of the right to fair trial for all individual, however heinous their crimes may be, will be a moral loss against those who preach hatred and violence."

Similarly judiciary has shown a similar response and it has moved starting from the case of *Kartar Singh* wherein no regard was given to the due process and validity of TADA was upheld to the recent trial of *Ajmal Kasab* where a fair trial is considered to be the only need of the hour. And in this trial following comments were made-

Raju Ramachandran, Amicus Curiae: "I bow to the verdict of the court. As amicus curiae I was given full opportunity to say all that I could in his defence. Let us take pride in our judicial system which adheres to due process, whoever be the accused and whatever be the crime".

Gopal Subramanium, Prosecutor: "As a prosecutor who argued this case, I can say this was done in a professional manner and in a dispassionate atmosphere. It is a complete victory of due process (of law). India must feel proud that in democracy we give every accused an opportunity to present his case."

Thus in the end I may conclude by borrowing the words of Shakespeare which reflect the idea that our system is based on the high ideals of due process and rule of law prevails and when the approach is upright and honest there can be no fear or terror:

> "There is no terror, Cassius,
> in your threats,
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> For I am arm'd so strong in
> honesty that they pass by me
> as the idle wind, which I
> respect not.
>
> There is no terror, Cassius,
> in your threats."[52]

[52] Brutus *in* JULIUS CAESAR: IV.